91-719

No. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN, Petitioner

- versus -

RICKY H. RALEY, Respondent

PETITIONER'S APPENDIX

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5446

RICKY HAROLD RALEY,
Petitioner - Appellant

v.

AL C. PARKE, WARDEN, Kentucky State Reformatory,
Respondent - Appellee.

Before: **Boggs**, Circuit Judge; **Brown**, Senior Circuit Judge; **Gibbons**, District Judge

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed in part, reversed in part, and a conditional writ of habeas corpus is granted in conformity with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant To Sixth Circuit Rule 24

No. 90-5446
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY H. RALEY,
Petitioner-Appellant

v. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

AL C. PARKE, WARDEN
Respondent-Appellee

Decided and Filed September 19, 1991

Before: BOGGS, Circuit Judge; BROWN, Senior Circuit Judge; and GIBBONS, District Judge.*

BOGGS, Circuit Judge. Petitioner Ricky Raley appeals from the district court's denial of his petition for a writ of habeas corpus. We affirm in part and reverse in part, with instructions that Raley's conviction shall be voided unless Kentucky holds an evidentiary hearing that conforms to the procedures we established in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990).

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*The Honorable Julia Smith Gibbons, United States District Judge for Western District of Tennessee, sitting by designation.

I.

Raley's petition involves his conditional plea of guilty in state court in May 1987 to burglary and Persistent Felony Offender, class I ("PFO I").[1] A person is guilty of PFO I if he or she has been convicted previously of two felonies in addition to the current conviction. Raley had pled guilty previously to two felonies, a three-count indictment for burglary in 1980 and one count of burglary in 1981.[2] In his 1987 guilty plea, Raley reserved the right to challenge the validity of the two convictions forming the basis for his PFO I conviction.

The state trial court held a hearing on Raley's contention before accepting the conditional plea. The hearing followed the procedure established by Dunn v. Commonwealth,

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[1]A conviction for PFO I is punished by a mandatory ten-year sentence.

[2]Raley also pled guilty to a charge of PFO II in 1981. A person is guilty of PFO II if he or she has one prior felony conviction.

703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986), in cases involving challenges to the validity of earlier guilty pleas where there was no record of the earlier plea proceedings. That procedure involves a shifting burden of proof. First, the Commonwealth must establish the fact of conviction. Then, the petitioner must present evidence showing either that his rights were infringed upon or that the procedures used were irregular. If the petitioner meets this burden, the burden then shifts to the government to prove the validity of the underlying judgment. Dunn, 703 S.W.2d at 876.

The hearing showed that there was no record of any colloquy regarding Raley's plea between the trial judge and Raley in either the 1980 or the 1981 case. Raley testified that he was unaware of his constitutional rights to a jury trial, to confront and examine witnesses, and to remain silent when he pled guilty to either charge. He testified that he had never had a trial, attended a trial, or paid attention to TV

crime shows that featured trials. He also testified that the judge accepting his 1981 plea told him only that he had a right to a jury. He concedes that he does not remember the entire colloquies he had with both judges, and that the judges accepting his pleas in 1980 and 1981 might have informed him of his rights.

Kentucky offered some evidence at the hearing that both pleas were entered knowingly and intelligently. It offered the records of conviction for both pleas. It presented Raley's attorney for the 1980 charge, Tom Marshall, who testified that, although he could not independently recall his representation of Raley, his general practice ws to inform his clients of their rights. Marshall also testified that he signed a "Certificate of Counsel" form attached to a "Plea of Guilty" form that detailed the constitutional rights a defendant would waive if he or she pled guilty. The certificate stated that Marshall had explained to Raley his constitutional rights. Raley did not object in any way to the

discussion involving the certificate or the "Plea of Guilty" form. The Commonwealth also cross-examined Raley, who admitted signing the "Plea of Guilty" form for the 1980 conviction. Finally, it showed that Raley had spent nine months in the state penitentiary in 1980 around other inmates who had been convicted by juries.

The trial court ruled that Raley entered knowing and intelligent pleas in each case, and Raley then entered his conditional plea. On appeal, the Kentucky appellate court, in a decision rendered on April 22, 1988, affirmed the trial court's decision. The Kentucky Supreme Court subsequently denied review.

Raley then filed his habeas petition in federal district court. Upon request by the court, the Commonwealth supplemented the record of the trial court hearing with certified copies of the "Certificate of Counsel" and "Plea of Guilty" forms for the 1980 plea. Raley did not object to the entry of these documents into evidence. The "Plea of Guilty" form, signed by

Raley, includes a section at paragraph 11 that reads as follows:

> I understand that I may, if I so choose, plead "Not Guilty" to any offense charged against me, and that if I should choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of counsel for my defense at all stages of the proceedings.

The Commonwealth did not provide a "Plea of Guilty" form for the 1981 conviction. I did provide a copy of a form entitled "Commonwealth's Recommendation on a Plea of Guilty." This document mentions the charges against Raley, the facts of the case, and the Commonwealth's recommendation regarding the guilty plea. It is signed by both Raley and his attorney for the 1981 conviction, Thomas Clay.

The district court, on March 15, 1990, denied Raley's petition with the following words:

> [T]he record plainly reflects that at the time of his guilty plea in late

1979[3] Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in a period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that Mr. Raley was explicitly informed of the charges against him in 1981.

Raley filed a timely appeal on March 2, 1990. We issued a certificate of probable cause immediately, but delayed the hearing of the appeal after deciding that appointment of counsel would aid Raley's appeal. We issued an order of appointment on December 14, 1990, and specifically directed the parties to brief the issue of the constitutional validity of the 1981 plea in light of our decision in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990).

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[3]Raley signed the "Plea of Guilty" form in November 1979. However, the plea was not formally accepted by the court until January 1980.

II.

A

Raley contends that Boykin v. Alabama, 395 U.S. 238 (1969) and Dunn require us to find that his plea was not entered knowingly and intelligently. Raley correctly notes that no transcript of either his 1980 or his 1981 plea proceedings exist, thereby placing the burden on the Commonwealth to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent. Boykin, 395 U.S. at 243. He again correctly notes that in Dunn we established that a state may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. Dunn, 877 F.2d at 1277. He once again correctly notes that we specifically disapproved in Dunn. Lighthart v. Parke, No. 90-5462 (unpublished opinion) (6th Cir. Dec. 10, 1990).

Raley concludes from this that Kentucky did not produce enough evidence to establish clearly

and convincingly his knowing and intelligent waiver of his rights. The fact of the silent record, combined with his testimony, creates a strong suggestion that he was not aware of his rights when he waived them. Raley criticizes Marshall's testimony by pointing out that Marshall could not independently recall ever representing him. He criticizes the importance of the "Plea of Guilty" form by pointing to his testimony that he did not read the form before he signed it.

The Commonwealth makes two arguments in response. First, it argues that Dunn was wrongly decided. It contends that the procedure followed by the trial court is consistent with a large number of cases that allegedly hold that the burden is always on the petitioner to prove that a writ of habeas corpus should be issued. Second, within our framework established in Dunn, the Commonwealth argues that it has provided clear and convincing evidence that Raley's plea was knowing and intelligent. For the 1980 plea, it points to the signed "Plea of

Guilty" form, which clearly enumerates the rights Raley waived. It also points to Marshall's testimony tht he habitually reviewed this form with clients pleading guilty before they signed it. This testimony is supported by the certificate signed by Marshall. For the 1981 plea, it primarily relies on the district court's statement that Raley cannot be presumed to have forgotten his rights in the less than two years that intervened since his 1980 proceedings. The Commonwealth also relies on parts of Raley's testimony that suggest he plea guilty in 1981 because he thought he was getting a good deal. Finally, it emphasizes that Raley was correctly informed of the charges lodged against him.

B.

Our prior decision in Dunn governs the disposition of this case. In Dunn, we expressly declared tht federal law, not state law, provides the appropriate standard for determining the constitutional validity of guilty pleas. Dunn, 877 F.2d at 1277, citing

Marshall v. Lonberger, 459 U.S. 422, 431 (1983). Kentucky's suggestion that Dunn was wrongly decided is legally incorrect. Almost all of the cases cited by Kentucky are irrelevant, dealing either with the burden of showing that a prior conviction should not be counted under the criminal history calculations of the Guidelines or with issues in habeas proceedings different from that examined in Boykin. "In habeas challenges to the validity of a guilty plea, however, courts uniformly assign to the state [after petitioner shows noncompliance with the requirements of Boykin] the burden of showing that the plea was obtained constitutionally." Fox v. Kelso, 911 F.2d 563, 569 (11th Cir. 1990) (collecting cases). Even if Kentucky's argument were correct, it would be beyond our power to overrule the specific holding of a prior panel. Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 689 (6th Cir. 1985). This court has already denied the Commonwealth's petition for a rehearing en banc to reconsider Dunn.

Our review of the evidence leads us to affirm the district court with respect to the 1980 plea, but reverse it with respect to the 1981 plea. We believe that the Commonwealth's proffer of the 1980 "Plea of Guilty" form conclusively establishes tht Raley was advised of his rights prior to pleading guilty. The form includes a specific paragraph listing the rights Raley was waiving, and informing Raley that he need not plead guilty. This lists includes three of the four rights Raley contends he ws not advised of, including the right to a trial by jury, the right to confront witnesses, and the right to compel witnesses in his favor to testify. Raley does not deny tha his signature is valid, and merely contends that he did not read the document before signing it. Were we to permit such self-interest allegations to override clear documentary evidence, a state could well find it impossible to meet its burden under Dunn.

We note that this court has previously found that a similar form satisfied the state's burden

of proof. In Brymer v. Dutton, No. 89-6102, slip op. at 6 (unpublished opinion)(6th Cir. June 17, 1991), a defendant making a Boykin challenge to a prior plea of guilty had signed a form stating that his attorney "has fully informed him of all of his rights and has explained them in detail," and that "a full explanation of his rights ws made to him in open court." The guilty plea form here is much more explicit, detailing the specific rights Raley waived.[4]

We reverse the district court, however, regarding the 1981 plea. The only relevant

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[4]Although no challenge to the admissibility of the form was made by Raley, we hold this form to be admissible. It qualifies as an exception to the rule against hearsay under Rule 803(24) because it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," Rule 803(24)(B), Fed.R.Evid., and the interests of justice require us to consider the only contemporaneous documentary evidence of Raley's knowledge of his rights. Rule 803(24)(C), Fed.R.Evid. Assuming that Raley did not receive sufficient knowledge of the document's existence prior to the trial court hearing -- although the lack of any surprise on Raley's part suggests that is not

evidence offered by the Commonwealth on this point was that Raley had been advised of his rights less than two years earlier. The evidence regarding whether Raley thought he got a "good deal" with the 1981 plea was rightfully rejected as irrelevant by the trial court as the issue before us is not why Raley pled guilty; it is what Raley knew when he pled guilty. The evidence that Raley was correctly informed of the charges against him is also irrelevant, as it is Raley's knowledge of his rights, not the charges, that is called into question.

We do not believe that the relatively short period of time between Raley's two pleas permits us to infer that he was aware of his rights in

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the case -- Raley still was made aware of the document's existence more than two years before the district court requested a copy to supplement the trial court record. This fully satisfies the Rule's requirements.

Nor do we see any problem with authentication. The district court specifically stated that the copy of the form that it admitted was certified, making it a self-authenticating document under Rule 902(8), Fed.R.Evid.

1981. This presumption, if consistently applied, would lead to a host of difficulties. Where would we draw the line within which a defendant is presumed to have remembered his rights? Two years? Ten? Would we be constitutionally required under the due process clause to hold a hearing to test the persistence of a defendant's memory so that an individualized determination could be made?[5] We do not want to step down such a path, and Kentucky has cited no case law that requires us to do so. Also, this principle requires us to treat persons with prior court experience differently than those for whom the current case is their first conviction. Boykin does not apply solely to the situation here and in Dunn, that of a repeat offender challenging a conviction of being a recidivist. This rule would effectively deprive the recidivist of rights that a first-time offender possesses.

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[5]See S. Dali, "The Persistence of Memory." Cf. M. Proust, Rememberence of Things Past.

The constitution does not permit us to parcel out different measures of rights. Absent the presumption of persisting memory, the district court's denial of the petition must be reversed.

III.

This brings us to the question of the remedy. The normal remedy when a petition is granted is to vacate the conviction and release the prisoner from custody, permitting the state to retry the defendant within constitutional guidelines. That, of course, is what Raley asks us to do. However, we believe that to vacate Raley's conviction unconditionally would do an injustice to Kentucky.

The primary record for this appeal is the trial court hearing. That hearing occurred in 1987, two years before we decided Dunn v. Simmons. Thus, the Commonwealth was not aware that it possessed the primary burden of persuasion, and that it had to prove Raley's knowledge by clear and convincing evidence. Had it known this, it is conceivable that it would have produced more evidence, such as producing

either the judge who accepted the 1981 plea or Raley's 1981 attorney, Mr. Clay. The district court did not hold an evidentiary hearing below, and it is clear that Kentucky's main line of attack was to challenge the validity of Dunn rather than move for a new, federal hearing. Although Kentucky's Supreme Court has adhered to the procedure we disapproved of in Dunn, see Conklin v. Commonwealth, 799 S.W.2d 582 (Ky. 1990), we believe that the interests of justice require us to permit Kentucky a chance to produce additional evidence that it may not have produced at the trial court hearing because it thought such evidence unnecessary to meet its burden under its interpretation of Boykin.

We do not believe that we possess the authority to order Kentucky courts to hold a new hearing pursuant to our standards in Dunn. However, we certainly have the power to issue the writ of habeas corpus conditioned on the state not holding such a hearing. See Gardner v. Pitchess, 731 F.2d 637, 639 (9th Cir. 1984)("considerations of comity underlying the

habeas writ . . . require that state courts be given an opportunity to correct alleged violations before federal courts step in"); Hart v. Eyman, 458 F.2d 334, 338-40 (9th Cir.), cert denied, 407 U.S. 916 (1972). See also Hart v. Marion Correctional Institution, 927 F.2d 256 (6th Cir. 1991). That therefore is our course; the district court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under the procedure outlined in Dunn v. Simmons on Raley's contention regarding his 1981 conviction. See Hart, 927 F.2d at 259. Of course, if such habeas relief is granted, Kentucky is free to retry Raley for PFO II.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part, and a conditional writ of habeas corpus is granted in conformity with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RICKY HAROLD RALEY,
Petitioner

v.

Civil Action No.
C89-0756-L(A)

AL C. PARKE, WARDEN
Respondent

JUDGMENT

This matter having come before the Court on Petitioner's request for a writ pursuant to 28 U.S.C. §2254, and the Court having entered its memorandum opinion and being advised,

IT IS ORDERED that the petition is denied.

This is a final and appealable order and there is no just cause for delay.

3- 15-90
Date

/s/ CHARLES M. ALLEN
Senior United States
District Judge

cc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RICKY HAROLD RALEY,
Petitioner

v.

Civil Action No.
C89-0756-L(A)

AL C. PARKE, WARDEN
Respondent

MEMORANDUM OPINION

This case presents petitioner's request that the Court issue a wit pursuant to 28 U.S.C. §2254. After examination of the materials of record and the arguments of the parties, the Court is of the opinion that an evidentiary hearing would no be of assistance, and that the petition must be denied.

The conviction petitioner challenges here occurred in May 1987. He enter pleas of guilty to a charge of burglary and a charge of being a Persistent Felony Offender in the first degree (PFO I). He received a total sentence of ten years. The predicate felony convictions used to

support the PFO I conviction occurred in 1979 (Indictment 79-CR-1214) and 1981 (Indictment 81-CR-0269), both involving guilty pleas. Petitioner's argument to this Court is that those prior convictions are insufficient to support the PFO conviction because the guilty pleas were not knowingly and voluntarily entered

The transcript of the state court evidentiary hearing conducted on this issue records petitioner's testimony that he did not recall either the judge or his attorney advising him of his rights [T.E. 14]. He did, however, admit that it was possible that the judge advised him of his rights on both occasions, but he did not recall [T.E. 34, 42].

The testimony of Mr. Marshall, who represented petitioner in 79-CR-1214, referred to a "plea of guilty" form, the purpose of which was to advise the defendant of his constitutional rights and to make a written record [T.E. 44-46]. A certified copy of that form has now been provided this Court. The form records petitioner's eleventh grade education,

recites that he has received a copy of the indictment, states that the defendant has consulted with his counsel concerning the charges, explicitly states the defendant's understanding of his constitutional rights, and is signed by Ricky Raley, November 29, 1979. On the same date, Mr. Marshall executed a form stating that he had fully explained to Mr. Raley the charges against him and Mr. Raley's constitutional rights, and that it was Mr. Marshall's opinion that Mr. Raley understood his rights.

While this Court has not been provided copies of these same forms for 81-CR-0269, we have been given a copy of the "Commonwealth's Recommendation on a Plea of Guilty," a document that recites the charges against the defendant, the facts of this case, and the recommendations on a plea of guilty. The paper concludes with the line "Agreed to this 8th day of October, 1981," and is executed by the Assistant Commonwealth's Attorney, by Ricky Raley, and by his attorney, Thomas E. Clay.

In short, the record plainly reflects that at the time of his guilty plea in late 1979, Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in the period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that MR. Raley was explicitly informed of the charges against him in 1981.

Accordingly, as there is no basis for the claim that the guilty pleas to the predicate offenses were not knowingly and voluntarily entered, the petition must be denied. An order in conformity has this day been entered.

3-15-90
Date

/s/ CHARLES M. ALLEN
Senior United States
District Judge

Opinion rendered: April 22, 1988, 3:00 p.m.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
INDICTMENT NO. 87-CA-1359-MR

RICKY HAROLD RALEY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HON. BENJAMIN F. SHOBE, JUDGE
ACTION NO. 86-CR-790

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING
* * * * * * *

BEFORE: GUDGEL, MILLER, and WILHOIT, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered any the Jefferson Circuit Court. Appellant pled guilty to the offense of being a persistent felony offender (PFO) in the first degree and was sentenced to a prison term of ten years. Pursuant to his reserved right under RCr 8.09, he contends on appeal that the trial court erred by denying his motion to prevent the use of two prior felony convictions as the basis for the instant PFO conviction. We disagree. Hence, we affirm.

Appellant pled guilty to a felony offense in 1979. In 1981, after spending a short time in prison, he was indicted both for a second felony offense, and as a second-degree PFO based upon his 1979 felony conviction. Appellant again pled guilty, and he was sentenced to a five-year prison term. A third felony indictment, including a charge of being a PFO in the first degree, was returned against him in 1986. After an evidentiary hearing the court determined that his 1979 and 1981 guilty pleas were valid. Appellant then agreed to plead guilty to the charges of second-degree robbery and first-degree PFO. This RCr 8.09 appeal followed.

First, appellant contends that the trial court impermissibly placed the burden on him to come forward with evidence to show that his convictions were invalid. We disagree.

The procedures to be observed in cases such as this were set out in Dunn v. Commonwealth, Ky., 703 S.W.2d 874, 876 (1985), cert. denied, _____ U.S._____, 107 S.Ct. 121, 93 L.Ed.2d 67 (1986), as follows:

> In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did,, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Thus, Dunn places on the Commonwealth the ultimate burden of proving the validity of any previous felony convictions. Although the Commonwealth's initial burden of going forward is met if it produces valid copies of prior judgments, the presentation of evidence of irregularity by the defendant shifts the burden back to the Commonwealth to point to evidence in

the record which indicates the voluntary and intelligent nature of the questioned guilty plea. If the record is insufficient for this purpose, the court must hold an evidentiary hearing on the issue.

Appellant complains that the trial court erroneously required him to adduce evidence as to the invalidity of his convictions, rather than requiring the Commonwealth to prove affirmatively that the guilty pleas upon which the convictions were based were valid. Inasmuch as we are satisfied that the trial court properly placed the ultimate burden of persuasion on the Commonwealth, however, we conclude that the actual order of proof was irrelevant and nonprejudicial. Moreover, we conclude that even if we agreed that Dunn conflicts with certain federal cases cited by appellant (and we are not persuaded that it does) we could not, as an intermediate appellate court, refuse to follow Dunn. See SCR 1.030(8)(a).

Appellant also contends that the Commonwealth failed to meet its burden of proof, and hence, that the tira court erred by finding that his prior guilty pleas are valid. We disagree.

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternatives open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Proof of a guilty plea's voluntary and intelligent nature may be derived not only from the evidentiary transcript, but also from the totality of the circumstances surronding the entry of the plea, as may be established at a subsequent evidentiary hearing. See Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978). Among the pertinent factors to be considered are the accused's background, experience, and conduct. Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980).

Here, the evidence shows that appellant had an eleventh grade education, that he could read adequately, that he was not intoxicated or otherwise incapacitated when he entered his questioned guilty pleas, and that he was represented by counsel on both occasions. With regard to his 1979 plea, the evidence also shows that his attorney certified that he had explained to appellant both the nature of the charges and the rights he would waive by pleading guilty. Moreover, appellant admitted that he signed a waiver form which both set out the charge against him and contained his acknowledgment that he was advised of his rights. Finally, appellant admitted that he could not specifically state that the trial court had not fully explained his rights to him. Further, he simply could not remember whether this had occurred. This evidence was sufficient, in our opinion, to support finding that appellant was made aware of his alternatives to pleading guilty, and that his 1979 guilty plea satisfied the dictates of

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The record contains less direct evidence as to the advice and counsel appellant received prior to entering his 1981 guilty plea. However, while appellant contends that he was ignorant of the charges against him, he acknowledges that he signed a form which specified the charges to which he agreed to plead guilty . Furthermore, the fact that appellant was apparently fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition, appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction. He knew, for example, of the differences both between first- and second-degree PFO charges, and between sentencing and parole requirments for each offense. Indeed, he indicated that the evidence against him and his lack of a strong defense had

persuaded him to accept the Commonwealth's offered plea bargain in return for a recommendation that he be given a minimum sentence. In fact, he voluntarily and knowingly chose not to risk the uncertainties of a jury trial. Based upon the evidence adduced ant the totality of the circumstances surrounding the guilty pleas, we condclude that the trial court's implicit conclusion that appellant's guilty pleas satisfy the dictates of Boykin, supra, is not clearly erroneous, and that the court did not abuse its discretion by denying appellant's motion to prevent the use of those pleas as the basis for his most recent PFO conviction.

The court's judgment is affirmed.

WILHOIT, J., CONCURS.

MILLER, J., DISSENTS.